

Civ. No. D053856

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

**DANIELLE GRIJALVA, an individual, and
CSFES, a California Corporation**

Plaintiffs and Appellants,

vs.

**HELGA BRANDT, an individual,
JOSEF MOTYCKA, an individual, and
ASSE INTERNATIONAL, a California Corporation,**

Defendants and Respondents,

**From the San Diego Superior Court
- North County Branch -
Case No. 37-2008-00052285-CU-DF-NC**

Honorable Jacqueline M. Stern

APPELLANTS' OPENING BRIEF

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I INTRODUCTION

The lower Court's granting of a special motion to strike essentially held that where parties have defamation suits against each other, the first to file is protected by Anti Slapp from suit by the second to file.

Appellant contends the first prong of the Anti Slapp statute was not met based on the showing put forth by Respondents. Appellant also contends the lower Court should have ruled on the merits rather than denying relief for late filed opposition.

II PROCEDUAL HISTORY

03/11/2008 Complaint Filed By Danielle Grijalva; CSFES.
03/11/2008 Notice of Related Case Filed By Danielle Grijalva; CSFES
03/24/2008 First Amended Complaint Filed By Danielle Grijalva; CSFES.
04/24/2008 Demurrer Filed By ASSE International, Inc.; Helga Brandt.
04/24/2008 Motion To Strike Filed By ASSE International, Inc.; Helga Brandt.
07/16/2008 Notice of Non-Receipt of Opposition
07/21/2008 Ex Parte Application for Late Opposition filed by Danielle Grijalva
.07/21/2008 Opposition to Motion to Strike filed by Danielle Grijalva
07/21/2008 Declaration of Danielle Grijalva
07/21/2008 Second Amended Complaint by Danielle Grijalva; CSFES
07/22/2008 Declaration of David Allen
07/22/2008 Opposition to Ex Parte Filed By ASSE International, Inc.
07/24/2008 Ex Parte Denied.
07/25/2008 Motion to Strike Granted. Attorney fees denied.
07/25/2008 Demurrer off calendar as Moot
08/04/2008 Motion for Attorney Fees by Defendants
10/17/2008 Opposition by Plaintiff
10/31/2008 Attorneys Fees Granted

III STANDARD FOR REVIEW

An order granting or denying a special motion to strike is appealable under §425.16, subd. (j) and §904.1, subd. (a)(13).

The court reviews the record de novo. *Paul for Council v. Hanyecz* (2001) 85 Cal. App. 4th 1356, 1364

The first determination is whether the defendant made an adequate showing that the plaintiff's action arose from protected activity. The second determination is to assess whether the plaintiff's suit has "minimal merit." Both prongs must be satisfied. *Navellier v. Sletten* (2002) 29 Cal.4th 82,

IV GENERAL PRINCIPLES

Strategic lawsuits against public participation are commonly referred to by the acronym "SLAPP." *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.

In 1992, the Legislature enacted section 425.16. The statute incorporated the Legislature's express declaration "that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." § 425.16, subd. (a)

In 2004, the Legislature enacted section §425.17, to exempt certain types of actions from the special motion to strike. The express legislative purpose was to address a "disturbing abuse" of the special motion to strike. §425.17, subd. (a)

The statutory definition of an "act in furtherance of [the constitutional] right of petition or free speech" comprises four categories: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." §425.16, subd. (e)

In assessing the first prong of the test--whether the defendant has demonstrated that the action is one arising from protected activity -- the trial court must consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 The trial court need not consider inferences arising from the pleadings. *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1001-1002

In analyzing the second prong of the test -- whether the plaintiff has demonstrated a probability of prevailing on the merits -- the trial court measures the plaintiff's showing against a standard similar to that used in deciding a motion for nonsuit, directed verdict, or summary judgment. *Varian Medical Systems, Inc. v. Delfino* 35 Cal.4th 180, 192

V STATEMENT OF FACTS

Plaintiff/Appellant Danielle Grijalva and CFSES run a website that advocates for the safety and welfare of foreign exchange students. (Appellant Appendix 1, page 1, paragraph 2)

Defendants, a California non-profit corporation and its employee/agents, charge fees to bring foreign exchange students to the United States. Defendant ASSE International has partnerships with foreign recruiting companies and other companies. (*Appellant Appendix 5, Exhibit A, page 1, paragraphs 1-4*)

Plaintiff fielded complaints on her website regarding a large number of exchange students in North Carolina who were without families for the upcoming school year. (*Appellant Appendix 1, page 2, paragraph 5*) (*Appellant Appendix 10, page 3, paragraphs 7-8*)

In response to Plaintiff's advocacy for the students, ASSE through its agents Helga Brandt and Josef Motycka, began a smear campaign against plaintiff by making false statements to foreign exchange student parents and hosts that Plaintiff

- a. had conducted her website and agency with a "commercial purpose"
- b. that she was "manipulating facts"
- c. that she was "not portraying a clear picture"
- d. that she "isn't interested in the welfare of the students"
- e. that she was "threatening" to send information on exchange agencies but "if got a contribution doesn't send anything"
- f. that she "represents herself as a federal agent"
- g. that she "performs background checks"
- h. that she is a known "liar"
- i. that she makes "false statements"

(*Appellant Appendix 3, page 5, paragraph 7 and 8*)

These were in emails.

(*Appellant Appendix 10, page 3, paragraph 10 through 22*)

While this was going on, the foreign partner of the Defendants in France, a recruiting agency named Programmes Internationaux D'Echanges, hired a New York Law Firm, associated a North Carolina firm and sued plaintiff in North Carolina for slander and interference with business relations. (*Appellant Appendix 5, Exhibit A, pages 1-12*). An ancillary suit was filed in the San Diego Superior Court, North County Branch, to enforce a North Carolina order for plaintiff's deposition in California on shortened notice. (*Appellant Appendix 2, page 3*)

Plaintiff, a housewife with three children whose husband works for the Post Office, runs her nonprofit on a volunteer basis out of her home. (*Appellant Appendix, Exhibit 10, page 1, paragraphs 1-4*) She struggled with limited resources to gain representation in North Carolina and California, eventually getting assistance under her homeowner's policy albeit with a reservation of rights.

Programmes Internationaux D'Echanges obtained, in North Carolina, a preliminary injunction against Plaintiff. World Heritage, a New York corporation, involved somehow in the placements and fee distribution, and ASSE International intervened in the North Carolina lawsuit to have the preliminary injunction order expanded to include their corporations. (*Appellant Appendix 5, Exhibit C, pages 1-13, and Appellant Appendix 5, Exhibit D, pages 1-6*)

ASSE International is headquartered and Helga Brandt works in Laguna Beach. Plaintiff, who lives in Oceanside, filed her lawsuit against ASSE International, Helga Brandt and Josef Motycka at the Vista Courthouse. (*Appellant Appendix 3, page 1*)

Defendants filed an Anti Slapp motion alleging the suit had no merit and was in retaliation for the North Carolina lawsuit. (*Appellant Appendix 4*) They also

filed a Demurrer essentially stating that the lawsuit was vague and uncertain.

(Appellant Appendix 6) Plaintiff's opposition was late filed.

Prior to the motions being heard, Plaintiff filed an ex parte application *(Appellant Appendix 8)* and appeared ex parte on successive days *(Appellant Appendix 14)* seeking to have her written opposition and declarations accepted by the court. Plaintiff prepared a Second Amended Complaint. *(Appellant Appendix 11)* to which she appended full text copies of the offending emails sent by defendants. The plaintiff attorney filed a declaration giving reasons for the delay as related to his role. *(Appellant Appendix 12)*

Plaintiff urged the court in the ex parte applications to sustain the demurrer with leave to file the tendered second amended complaint. *(Appellant Appendix 8, page 2)* The court refused to allow the requested relief, *(Appellant Appendix 14, page 1)*

The court then issued and later adopted as its order a tentative ruling stating in part:

Pursuant to Calif Rule of Court 3.1300(d), the Court declines to consider Plaintiff's late filed/served opposition brief. That brief was filed one week late, which has deprived Defendants the opportunity of filing a timely reply brief.

(Appellant Appendix 14)

The court refused to consider the detailed and lengthy declaration of Danielle Grijalva *(Appellant Appendix 10)* or and refused to allow or consider the tendered second amended complaint *(Appellant Appendix 11)*.

In granting the Motion to Strike Court ruled that:

Defendants have sufficiently shown that the at least part of the first and second causes of action arise out of statements made by defendants in the complaint in the North Carolina case. The court concludes the protected statements are not "merely incident" to the potentially unprotected statements alleged in the first

amended complaint. Thus, Defendants have met their initial moving burden on this motion.

(Appellant Appendix 15, page 2)

However, there is nothing in the complaint or first amended complaint that sought damages for any alleged statement made in the North Carolina lawsuit.

There was no claim for abuse process. There was no premature malicious prosecution allegation or cause of action. The North Carolina suit was not alleged in the complaint as part of the smear campaign against plaintiffs. *(Appellant Appendix 1 and 3)*

On the contrary, the complaint and first amended complaint alleged that:

Defendant ASSE in response to the attention generated on the problems it created, set out to malign CSFES and Danielle Grijalva with an intentional and false campaign directed to the parents of the students and to citizens with concerns regarding the problems caused by ASSE's misconduct

(Appellant Appendix 1, page 3, paragraph 7)

(Appellant Appendix 3, page 3, paragraph 7)

The allegation in the complaint that statements were made to parents and other concerned people does not equate to an allegation or cause of action for statements made in a lawsuit in North Carolina.

As the Defendants themselves stated in their Demurrer that was filed concurrently and set for hearing on the same day:

Nowhere in the First Amended Complaint do plaintiff's allege any identifying facts regarding when the defamatory statements were made, in what context they were made, or any other facts which would allow Defendants to understand the nature and basis of Plaintiffs' defamation claim.

(Appellant Appendix 6, page 7 line 16 through line 19)

The concurrently filed Motion to Strike did not specify or argue that the

defamation alleged by plaintiff in her complaint was for statements made in the North Carolina lawsuit. The Motion to Strike only argued that plaintiff's lawsuit was an effort to "chill" their right to pursue the litigation in North Carolina (*Appellant Appendix 4, page 3 line 8, and page 3, line 20-22.*) The Motion to Strike argued that the plaintiff's causes of action "*fail as a matter of law because they are uncertain and fail to include the fundamental allegations necessary to obtain a judgment in plaintiff's favor.*" (*Appellant Appendix 4, page 3 line 25-27*) The Motion to Strike argued that the "*blatant defects*" proved a "*vindictive nature*" on the part plaintiff (*Appellant Appendix 4, page 3, lines 27-28*)

The argument put forth by Defendants in their Motion to strike was that because the Defendants had accused Grijalva in their North Carolina lawsuit of "*disseminating false and misleading information*" and because her lawsuit against them in California was making "*making false statements*" that this meant that her lawsuit was directly related to the North Carolina lawsuit for purposes of Anti Slapp. (*Appellant Appendix 4, page, 8 line 25 through page 9, line 7*). This tautology was not made the basis for the lower Courts ruling granting the motion.

The ruling the lower court issued did not have any evidence on which to base the court's assertion that that the complaint was seeking to recover damages for statements made in the North Carolina lawsuit.

VI ARGUMENT

The demurrer for uncertainty, and the arguments in the motion to strike that capitalized on the vagueness of the complaint, were disingenuous. The defendants had made the contacts and sent the emails. They perhaps did not

know how many of these emails were forwarded to plaintiff by the recipients but they did know before plaintiff's lawsuit of the offending content.

The defendants had adequate notice of the statements on which they were sued even if a cold reading of the complaint was cryptic to the court.

Plaintiffs' causes of action in California are separate and independent of the causes of action in the lawsuit filed against plaintiff in North Carolina.

Plaintiffs should not be precluded from their causes of action here just because defendants sued first on their causes of action there.

The opposition was admittedly late but an effort to correct was made by properly noticed written ex parte application with an attorney declaration stating the reasons for the delay. Also tendered were a formal opposition to the motion to strike, an extensive declaration by plaintiff, and a proposed third amended complaint. In these circumstances a bit more of a nod toward hearing the matter on the merits would not have been inappropriate.

Irrespective of the probability of success shown by plaintiff's declaration, the ruling on the first prong was in the nature of a terminating sanction since the evidence to sustain the ruling was not present.

The lower court's ruling granting the special motion to strike should be reversed.

Dated: March 6, 2009

Respectfully submitted,



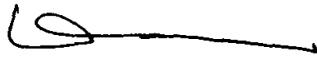
DAVID ALLEN
Attorney for Appellant

CERTIFICATE OF COMPLIANCE
(Cal. Rules of Court, Rule 14(c) (1))

The text of this brief consists of 2,607 words, inclusive of footnotes, as counted by this office's Microsoft Word program which was used to generate this brief.

Date: March 6, 2009

LAW OFFICES OF DAVID ALLEN

By: 

DAVID ALLEN
Attorneys for Respondents

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to this action. My business address is P O Box 2755, Vista, California 92085

On March 6, 2009, I served the foregoing document described as

APPELLANT'S OPENING BRIEF

on the interested parties in this action, by placing true copies thereof in envelopes addressed as follows:

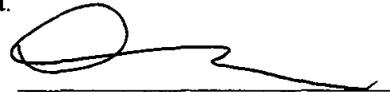
Colin C. Holley, Esq.
HAMPTONHOLLEY LLP
2101 East Coast Highway, Suite 260
Corona Del Mar, California 92625
(one copy)

California Supreme Court
300 South Spring Street, 2nd Floor
Los Angeles, California 90013
(five copies)

Hon Jacqueline Stern, Dept 27
San Diego Superior Court
325 South Melrose
Vista, CA 92081
(one copy)

I mailed the envelopes by deposit with the U.S. Postal Service with postage prepaid in Vista California.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing documents, and all copies made from same, were printed on recycled paper, and that this certificate of service was executed by me on March 6, 2009, in San Diego County California.



David Allen